The General Arbitration Treaties.

Speech of Hon. Porter J. McCumber, of North Dakota, in the Senate of the United States, Thursday, January 18, 1912.

Mr. PRESIDENT: Inasmuch as any uncertainty as to proper construction of these treaties can easily be cured, either by an amendment in the body of the instruments themselves or in the resolutions adopting them, we might well relieve ourselves of all effort to maintain our particular views of the construction that ought to be accorded to them; and if there were no other reasons compelling a further discussion of construction I certainly should not ask the attention of the Senate to any further argument along that line.

But when, on the floor of this Senate, it has been openly charged that the President of the United States has with studied purpose attempted to deprive the Senate of its constitutional power as a part of the treaty-making body and to transfer its functions to a commission; when he has been accused of impliedly, at least, attempting to avoid the Constitution which he has sworn to support, I feel it is the moral duty of those who deny that any such construction should be given to those proposed treaties to make public in the same tribunal their earnest dissent from those charges.

I have sometimes differed greatly with the President of the United States on questions of internal policy, but no man can ever justly challenge his sincerity of purpose, his uniform candor, or his devotion to the Constitution and the people of this country.

The President declares that there is no purpose in these treaties to limit or curtail the constitutional power of the Senate. The Secretary of State so declares; and, Mr. President, the treaties themselves negative such purpose and can only be made to support it by a process of reasoning which shall violate the three fundamental rules of construction—first, that every provision should be given effect; second, that every provision should be made harmonious; and third, that each provision should be considered with reference to the object sought to be attained and the usages and customs pertaining to it.

I was not present at the committee meeting when the majority report presented by the Senator from Massachusetts [Mr. Lodge] was adopted. I am not, therefore, informed as to whether it represents the views merely of a majority of those who were present at that meeting or whether it has back of it the numerical majority of the entire committee. But I am certain that it cannot be sustained without violating these fundamental rules of construction; that to sustain it we cannot give effect to each and every provision; that to sustain it we are compelled to leave certain provisions inharmonious and in conflict; that to sustain it we must obliterate from our minds the prime purpose of section 2 and the customary method of bringing international questions before the treaty-making body.

Mr. President, the members of the Committee on Foreign Relations are, I believe, unanimous in their desire to provide for the settlement by an arbitral tribunal of every international difference that may arise not affecting the honor, independence, vital interest, or traditional attitude of any country upon questions which it deems essential to its national safety.

The only difference that has arisen in the committee is one of construction of the arbitration agreements submitted. Every member of the committee, as well as every Member of the Senate, must agree that the Senate, as a part of the treaty-making power of the Government, cannot in law, and ought not in policy, surrender its constitutional right to assent to, modify, or reject any agreement of a treaty character submitted to it, or its right to insist that every such agreement shall be submitted for its action.

If it can be established beyond reasonable cavil that these treaties do not purpose to deprive the Senate of its full constitutional power as a part of the treaty-making machinery of the Government, that its constitutional authority is in no way threatened or impaired, then the only question is the broad one, Does the Senate of the United States desire to take this great and advanced step looking toward universal peace, the abolition of the horrors and devastations of war, and the removal of the onerous burden of maintaining vast armies and navies which are today sapping the very life of nations and requiring nearly three-fourths of the national revenues throughout the world?

Mr. President, the longer one studies and the more carefully he analyzes the provisions of these agreements the more certain he will become of the untenableness of any construction of them that will impair the constitutional right of the Senate to exercise its judgment and discretion upon the whole or any provision contained in them.

Reduced to their simplest mode of expression, these agreements provide:

First. By Article I that international differences which cannot be settled by diplomacy and which are justiciable in their nature shall be submitted to arbitration.

Second. That they shall be submitted by special agreements in each case.

Third. That these special agreements in this country in each case shall be made by the President by and with the consent and advice of the Senate.

Note right here that no difference can be submitted to arbitration except by an agreement, which must be submitted to the Senate.

Fourth. That the agreements shall provide that the differences shall be submitted either to The Hague tribunal or to a special arbitral tribunal whose powers, duties, and procedure shall be fixed by the agreements.

All these shall be submitted to the Senate for its advice and consent.

These are the essential features of Article I.

So far everything is clear. So far there is no disagreement in the committee as to the proper construction to be placed upon these agreements; it, however, has been intimated that we might well dispense with Article II, the provision for the creation of a commission.

But, Mr. President, history, and very modern history, has often taught the lesson that differences may become so acute, that national sentiment or pride may be so wrought up through exaggerated statements or bellicose utterances, that it may become impossible while the tension exists for a government to submit even the most clearly arbitrable questions to any international court. And to avoid this danger, to prevent such crises, as well as to secure correct data and an unbiased presentation of the claims of each nation for use and guidance in case the matter shall be formulated into an agreement for

submission to arbitration, Article II is inserted in the agreement, and I desire Senators specially to note the purposes of this Article II.

This article binds the parties, as occasion may arise, to constitute a joint high commission of inquiry composed of three nationals of each country, unless otherwise constituted in any particular case, to impartially and conscientiously investigate any controversy between the countries within the scope of Article I, and to investigate it even though they are not all agreed that it falls within the scope of Article I.

There are many occasions in which such an investigation ought to be made. I can cite one in the recent history of this country when we raised the Monroe Doctrine in the Venezuelan affair, in which a question might well have been discussed, not whether there was any attempt to violate the Monroe Doctrine by the other country, but whether the real question at issue was one that would come within the provisions of the Monroe Doctrine.

But remember, also, that this is an investigating commission only, and that its investigation precedes and is preliminary to any agreement for arbitration. Its function is partly to apprise the governments concerned of the facts that they may determine whether the case is an arbitrable one, and if so, the character of the agreement for its arbitration which should be submitted to the Senate by the Executive of this Government or to the proper treaty-making power of the other Government.

And again I ask the Senate to note how carefully the negotiators of these agreements have guarded against the infringement of the proper functions of the treaty-making power of the Government by this joint high commission. In the second paragraph of Article III, it is declared:

"The reports of the commission shall not be regarded as decisions of the questions or matters so submitted, either on the facts or on the law, and shall in no way have the character of an arbitral award."

Now, we must find somewhere a purpose to make an exception to or to modify that clear proposition. This inhibition should be kept clearly in mind in arriving at the intent and purposes of these agreements.

So far, therefore, Mr. President, the agreements not only do not challenge the constitutional right of the Senate, but everywhere recognize and uphold it, first, by positively declaring that each agreement for arbitration, whether the agreement comes through the President directly or whether this joint high commission, must be submitted to the Senate for its advice and consent; second, by providing that the report of the joint high commission shall, in effect, be advisory only.

I now approach directly the paragraph in controversy with the single object of determining whether that paragraph, by sudden divergence of purpose, clearly antagonistic to the purposes so far indicated, nullifies the provisions of Article I that these agreements shall be made by and with the consent and advice of the Senate and also nullifies the immediately preceding paragraph, that the report of the commission shall not be regarded as decisions either upon the fact or the law.

To say that the negotiators of these agreements intended by the last paragraph of Article III to destroy the clear and positive declarations of Article I and further to destroy the preceding paragraphs of Article III, the first of which declares for the submission of the agreements to the Senate, and the second carefully guards against any conclusion of the committee having more than advisory force, is, in my judgment, paying scant respect to the ability of lawyers who have held the highest judicial positions in the country.

Mr. President, this paragraph will not bear the construction contended for as elucidated in the majority report; and it cannot, without taking a whole clause bodily out of it, be made to conform to the construction placed upon it by that report.

Let us analyze paragraph 3, which we are asked to strike out. It reads:

"It is further agreed, however, that in cases in which the parties disagree as to whether or not a difference is subject to arbitration under Article I of this treaty, that question shall be submitted to the joint high commission of inquiry; and if all or all but one of the members of the commission agree and report that such difference is within the scope of Article I—"

And I want Senators to pay attention to the words—"it shall be referred to arbitration in accordance with the provisions of this treaty."

What is the meaning of the language "shall be referred to arbitration?" Does it mean that it shall absolutely be arbitrated without reference to anything else? Is there any magic in the word "referred" as it is used in this third subdivision that gives it greater force or potentiality than is contained in the word "submitted" as it appears in the first paragraph? One paragraph says that in case the President believes—in effect, it so says—that it is justiciable it shall be submitted to arbitration; the other says that if all, or all but one, of the commission declare that it comes within the scope of Article I, it shall be referred to arbitration. Is there any greater force in the words "referred to arbitration?" Do they carry a meaning greater than that in the preceding paragraph that it shall be submitted to arbitration?"

The Senator from Maryland [Mr. Rayner] in his very eloquent discussion here the other day stated—and I have his words—

"If it was intended that the decision of the joint high commission should not be a finality, there would not have been the slightest difficulty in so expressing it and inserting in the treaty a clear and unambiguous provision that after the decision of the joint high commission it could then be reopened in the Senate for its acceptance or rejection."

But, Mr. President, that is a double-edged sword; that is an argument which cuts deeper backward than it does forward. After a provision which has clearly declared that this finding shall not be final, if the negotiators purposed to make an exception, then we might rather look for some words that should clearly indicate that purpose. If it was intended that the finding should be final upon a particular question, I answer the Senator's argument by saying it was the easiest thing in the world for the negotiators to have declared, not that this shall be "referred to arbitration in accordance with the provisions of this treaty," but that it "shall be arbitrated without further action;" that it shall without further action be submitted either to The Hague tribunal or be submitted to some other particular tribunal.

When read in the light of both Articles I and II the purpose of the last paragraph of Article III is clearly

apparent. There can be no clear line of demarcation between questions that are justiciable—that is, those which do not affect the vital interest, independence, honor, national safety, or traditional attitude of any country—and those which are not justiciable. As a rule the jealous concern of any great country for its own future will be a sufficient guaranty that no question involving its honor, vital interest, or its traditional attitude, which attitude is always based upon what it considers its vital interest, will ever be submitted to arbitration; and that both nations should by solemn compact agree to submit the destiny of their governments, involving millions and hundreds of millions of people, to the disposal of any arbitral court is unthinkable, and as such unworthy of serious consideration.

But there may be, and naturally must be, a zone where the one question merges into the other and where, without serious charge of caprice, one government may claim that a question is clearly justiciable while the other may claim that it is not. Such a case may depend upon both questions of law and fact. Such questions of law and fact may need investigation. If, after such investigation, the facts are so clear that at least five out of six, or all of the nationals of one country and all but one of the other, agree that the matter is a justiciable question, then it may be referred to arbitration, not that it shall beyond all quesion go to arbitration, but that it may be referred to arbitration. But how is it to be referred?

And right here is the crux of the whole question. Suppose that all the members of the joint high commission, or all but one, decide that the case is clearly justiciable, then what becomes of it? Is it immediately referred to The Hague tribunal or other arbitral tribunal? Certainly it is not. No other tribunal at this stage has even been created. It is to be referred to arbitration in accordance with the provisions of this treaty. What provisions of this treaty? Manifestly those provisions in Article I which provide for special agreement to be made between the contending countries, and in this country submitted to the Senate for its advice and consent.

What would be the mode of operation? The joint high commission having found by unanimous or almost unanimous decision that the case is justiciable—that it comes within the provisions of Article I—the two governments proceed to draw up a special agreement to refer the case to arbitration—not to arbitrate it, but to refer it to arbitration. This special agreement must either provide for its submission to The Hague tribunal or to some other tribunal, the constitution of which will be fixed in the agreement. This agreement must then be submitted by the President to the Senate of the United States.

And when this special agreement comes before the Senate, what function is to be performed by the Senate in reference to it? If the construction contended for in the majority report is to govern, the submission to the Senate is simply perfunctory; the reference to it is but idle ceremony. It is submitted to it for its advice, but it is estopped from advising. It is submitted to it for its consent, but it is estopped in honor from withholding its consent. I submit that is a most extraordinary and strained construction. It is a construction that does violence to every natural intendment of the positive and specific provisions contained in the instrument. When a treaty is submitted to the Senate for its advice and consent—and I speak of treaties in general—the negotiators know and understand that the power of the Senate in reference to it is unlimited. When, therefore, these agreements, which are in effect separate and distinct treaties, are submitted to the Senate for its advice and consent, what warrant have we to assume that the negotiators intended that the powers of the Senate should be curtailed?

I purpose to more closely analyze this last provision. It is suggested that this paragraph declares that if the commission agree and "report that the difference is within the scope of Article I it shall be referred to arbitration," and, that therefore while the Senate has the undoubted right to disagree with the conclusions of the commission, it would not be acting in good faith in so doing.

Mr. President, that is giving a wrong construction to the word "referred;" that is giving the words "referred to arbitration" the same meaning as though the instrument declared positively that the difference should be arbitrated. We are no more justified in according those words that conclusive meaning than we are in assuming, when we use the words in the first paragraph, that it "shall be submitted to arbitration." That we therefore mean that the difference must go to arbitration, and the Senate could not act in any way antagonistic to that idea when the matter is submitted under the provisions of Article I. But, Mr. President, that is not the complete declaration. The declaration is that it shall be referred to arbitration "in accordance with the provisions of this treaty," and that makes an entirely different proposition. That negatives any assumption that it should be referred to arbitration without first going through the Senate in some form. That means that it will be referred to the Senate and will be arbitrated if the Senate advises that it shall be done; and I submit that means that the Senate can use its full and unfettered judgment as to whether the case does actually come within the scope of Article I. If there is left one solitary reasonable doubt that the negotiators did not intend that the Senate should be precluded from exercising its full judgment, if there remains a single doubt that such an exercise of judgment on the part of the Senate was not to be deemed an act of bad faith, and that the Senate should not be estopped by the finding of the commission from holding a view contrary to its findings, that doubt is dissipated by the provision which in no uncertain words declares:

"The reports of the commission shall not be regarded as decisions of the questions or matters so submitted, either on the facts or on the law."

This is what the instrument says as to the finality of the conclusion of the commission. I will ascertain further whether the succeeding clause modifies that. It especially declares that it is not final. And if the decisions are not conclusive there is but one body that can make them conclusive—the treaty-making body, the President and the Senate.

I am not unmindful of the particular words used in the beginning of the third paragraph, following the paragraph which is quoted, namely:

"It is further agreed, however, etc., that if the commission agree and report that such difference is within

the scope of Article I, it shall be referred to arbitration."

But now, if you will look at the provision, you will find that this is a distinct paragraph and not a part of and not intended to modify the preceding paragraph as to the non-conclusiveness of all of the decisions of the commission. It is rather, Mr. President, a modification of the first article.

Now, let us look into that a little. Under Article I, the President could not submit a case to arbitration—that is, he could not formulate an agreement, and that is what "submit to arbitration" means, so far as he is concerned—and submit it to the Senate for its advice and consent, when he considered that such an agreement would not be within the scope of Article I, even though the whole world might believe otherwise, and though every Member of the Senate might believe otherwise. So this second article is inserted providing for a commission to investigate, and it is intended by this provision, which the majority report seeks to strike out, to insure the proper preliminary steps being taken when the question is so clearly within the scope of Article I as to receive the unanimous, or lacking but one of the unanimous, report of the commission. When the case is so clearly within the scope of Article I as to secure such a finding, then the preliminary steps shall be taken to bring the matter before the Senate for its advice, even though the President might not be satisfied that the case was clearly within the scope of Article I. In such case it is made his duty to take the initiatory steps to bring the matter before the Senate for its advice, and without that there is no duty imposed upon him to bring it before the Senate for its advice. Suppose, in the matter of the Venezuelan trouble, to which I have referred, the President of the United States, for political or other reasons, or because he wanted to have his own way, had answered the final note that came from Great Britain, in which that country disclaimed any intention to take territory other than that which it had claimed, prior to the promulgation of the Monroe Doctrine, by denying the right of arbitration upon the ground that the Monroe Doctrine is not an arbitrable question, and therefore the subsidiary question as to whether Great Britain was seeking territory outside of what she held prior to the Monroe Doctrine was not an arbitrable question. In such case the matter could never have gotten before the Senate for its consent and advice.

This is the view taken by the negotiators of these instruments, the President and the Secretary of State. And this is the only view that will harmonize all of its provisions. And between a construction which will give harmony and effect to every provision of an instrument and a construction that will leave them in conflict, or that will compel us to eliminate—as I will soon show we must eliminate—some word or words as having no purpose, the former must be adopted.

Mr. BACON: Mr. President, may I be permitted by the Senator to ask him a question at that point?

Mr. MCCUMBER: Certainly.

Mr. BACON: I understand the proposition, which the Senator is arguing with great earnestness and force, to be that if the Senate, after the joint high commission has adjudged a certain question to be justiciable, should disagree with that commission, the Senate would be authorized under the terms of this treaty to refuse to submit it to arbitration?

Mr. MCCUMBER: In exactly the same way as it would if it had come directly from the President in the first instance without being passed upon by the commission.

(Much of the running debate which followed is omitted, as it did not throw any essential light on Senator McCumber's position.)

(Concluded next month.)

Can War Be Abolished?

By Ralph Blumberg.

The twentieth century has brought forth inventions and improvements which far surpass anything in former years, and it seems we are rapidly approaching an era of perfection, not alone in the industrial sphere, but also as regards civilization, elevation of morals, and social advancement. However, the most important progress remains to be accomplished. Looking at it from a humanitarian point of view, it has to be made in a different field altogether, and has for its object nothing less than the realization of the establishment of permanent peace among all the nations of the globe.

In connection with the establishment of the International Peace Tribunal at The Hague, two international conferences have been held for the purpose of considering measures to assure permanent peace, and another will be held at The Hague in 1915. All this indicates an ardent desire to remove all causes that possibly could lead to hostilities between nations and the prevention of the fearful horrors of war, the misery and blight that follow in its wake.

"Thou shalt not kill" is one of the commandments brought down by Moses from Mt. Sinai, forty-two hundred years ago. About sixteen hundred years later came the prophecy of Isaiah, "Nation shall not lift up sword against nation, neither shall they learn war any more." The commandment of God has been totally ignored by the killing of people in continuous wars, with the consequence that every one of the ten commandments has been broken. The prophecy of the immortal seer has been disregarded. The nations are continually increasing their armaments, and the cruel art of war is practiced on a more extensive scale than in the days of idol worship, darkness, and barbarism. With the progress of civilization the horrors of bloodshed have not diminished; on the contrary, war has been made an art, the study of which many great men have made their object in life, and through which they have become famous in history. Such men were the conqueror Cyrus, who, not content with ruling Persia, attempted the conquest of all Asia; Alexander the Great, who cried for more worlds to conquer; Julius Cæsar, who carried war into every country of Europe and Africa.

The last century witnessed the rise and fall of the Emperor Napoleon, whose ambition was to master the whole of Europe, which he had almost accomplished when fate turned against him and commanded a halt to the pillage and murder.

It is those men that were the idols of their respective nations, and all the countries that were penetrated had either to submit to them or lay their country open to the curse of war.

Conditions are not much improved in the present century. On the contrary, war has been developed from an art to a science, and millions of people are employed in